

STATE OF MICHIGAN
COURT OF APPEALS

CRAIG M. LAKIAN,

Plaintiff-Appellant,

v

GRAND RAPIDS PLASTICS, INC.,

Defendant-Appellee.

UNPUBLISHED

December 30, 1997

No. 193408

Wayne Circuit Court

LC No. 94-436321-CK

Before: Michael J. Kelly, P.J., and Cavanagh and Lambros*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

I

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because there were genuine issues of material fact as to whether defendant agreed to pay plaintiff a commission and as to whether plaintiff was the procuring cause of defendant's sales to Daikyo/Decoma. We disagree.

A basic requirement of contract formation is that the parties mutually assent to a contract to be bound. *Rood v General Dynamics Corp*, 444 Mich 107, 118-119; 507 NW2d 591 (1993). Before

* Circuit judge, sitting on the Court of Appeals by assignment.

a valid contract can be formed, there must be a meeting of the minds with regard to the essential terms of the contract. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). In determining whether a party has assented to a contract, an objective test is used. The focus is on whether a reasonable person could have interpreted the words and conduct of the parties in the manner that is alleged. *Rood, supra* at 119.

After reviewing the record, we conclude that the trial court did not err in finding that the initial conversation between the parties was insufficiently complete to constitute a final contract and, in addition, that the further discussions revealed that the parties did not reach an agreement as to how and on what basis a commission would be paid to plaintiff. Plaintiff admitted in his deposition that the parties did not discuss what obligations he would be required to fulfill to receive a commission from defendant. Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract. *Kamalnath, supra* at 549. Furthermore, the parties' later negotiations regarding a manufacturer's representative contract indicate that the parties did not believe that a contract already existed.

Plaintiff relies on his affidavit, in which he stated that there was an unequivocal agreement to pay a commission. However, a party may not create a factual dispute by submitting an affidavit that contradicts the party's prior testimony. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997).

Under the circumstances, the trial court did not err in finding that plaintiff was not entitled to a commission under the procuring cause doctrine. Plaintiff did not have an express contract with defendant, and he admitted that he was not otherwise acting as a manufacturer's representative. See *Reed v Kurdziel*, 352 Mich 287, 294; 89 NW2d 479 (1958). Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

II

Plaintiff next contends that the trial court erred in holding that the wrongful conduct rule would bar plaintiff's claim for a commission because his conduct violated state and federal law. However, because there was no express contract and plaintiff was not otherwise entitled to a commission, we decline to address whether the wrongful conduct rule is applicable.

III

In his final issue, plaintiff argues that this Court should remand this case to the trial court so that plaintiff's complete deposition testimony can be introduced into the record. We disagree. This Court's review is limited to the record presented to the trial court. MCR 7.210(A); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Plaintiff has failed to persuade us that an exception to this rule is warranted. Moreover, another panel of this Court has already rejected

plaintiff's claim,¹ and we are bound by that decision. See *MS Development, Inc v Auto Plaza of Woodhaven (After Remand)*, 220 Mich App 540, 548; 560 NW2d 62 (1996).

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh

/s/ Nicholas J. Lambros

¹ *Lakian v Grand Rapids Plastics, Inc*, unpublished order of the Court of Appeals, entered March 20, 1997 (Docket No. 193408).